



U.S. Department
of Transportation

**Federal Railroad
Administration**

Memorandum

Date: February 3, 2004

Reply to Attn of: OP-04-30

Subject: Hours of Service Interpretation - Awaiting Deadhead Transportation

Original Signed By:

From: Edward W. Pritchard
Director, Office of Safety Assurance and Compliance

To: Regional Administrators

Attached is the Federal Railroad Administration's Assistant Chief Counsel for Safety, Daniel C. Smith's November 21, 2001, letter to the Union Pacific Railroad Company. The letter contains FRA's application of the Federal hours of service laws concerning train service employees who are awaiting deadhead transportation to carry them to their point of final release. Mr. Smith's letter also becomes the basis for this bulletin.

FRA Inspectors are to utilize the contents of this letter as guidance in their inspection and compliance-assurance efforts. It must be understood that enforcement actions involving recommendations for the assessment of civil penalties by FRA's Office of Chief Counsel cannot be initiated against a railroad or an individual based solely upon information contained in this bulletin. Civil penalty recommendations to FRA's Office of Chief Counsel must reference one or more of the following:

1. A statutory provision of the Federal hours of service laws (i.e., 49 U.S.C. Sections 21101 - 21108), wherein the "plain meaning" of the words of the provision establish the basis for the alleged violation;
2. An interpretation published in Appendix A to 49 CFR Part 228; or
3. Prior correspondence to that railroad or individual, wherein FRA explained the basis for its interpretation that the conduct in question constitutes a violation of the Federal hours of service laws.

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November 21, 2001

Dear Mr. Opal:

Thank you for responding to my letters concerning the Federal Railroad Administration's (FRA) review of the Union Pacific Railroad Company's (UP) operating rules and special instructions relating to time spent by employees required to stay with their trains while awaiting deadhead transportation. FRA has been attempting to determine how to properly account for such time under the Federal hours of service laws ("HSL," See generally 49 U.S.C. chapter 211, formerly known as the Hours of Service Act). In initiating this inquiry, FRA noted that UP train crews are subject to special instructions concerning securement of standing trains in grade territory, and sought to determine whether the employees while waiting on trains are providing service by taking measures to protect their trains from unexpected movement or are actually free of all responsibilities during the waiting period.

For the reasons explained below, we have concluded that UP employees, even where the grade territory instructions apply, are not performing service and are in limbo time (neither on duty nor off duty) while merely waiting on or with their trains for deadhead transportation. However, employees who are required or permitted to perform any particular duties while awaiting deadhead transportation are on duty. Moreover, if employees waiting on or with their train are required to remain on or with it even after their deadhead transportation arrives, they are not awaiting deadhead transportation but are instead performing service for the railroad.

The HSL and Case Law Concerning Time Spent Awaiting Deadhead Transportation

Under the HSL, the time of an employee whose duties are subject to those laws is divided among three categories: on duty, off duty, and limbo time. Time spent actually engaged in or connected with the movement of a train is time on duty, as is time spent performing any other service for the railroad during the same 24-hour period. 49 U.S.C Section 21103(b)(2) and (b)(3). Time spent in deadhead transportation to a duty assignment is also time on duty, but time spent in deadhead transportation to the point of final release is limbo time. 49 U.S.C. Section 21103(b)(4).

In the case of Brotherhood of Locomotive Engineers v. Atchison, Topeka and Santa Fe R.R., 516 U.S. 152 (1996), the United States Supreme Court held that all time spent awaiting the arrival of a deadhead vehicle for transportation to the point of final release, when no additional services are required of railroad carrier employees, shall be classified as limbo time for HSL purposes. The Court rejected the notion that an employee is on duty during this period merely because he or she may potentially be required to perform services while awaiting transportation. However, if an employee is required to perform service of any kind during that period, he or she will be considered as on duty until all such service is completed.¹ Of course, where a railroad's operating rules clearly relieve the employee of all duties during the waiting period and no duties are specifically assigned, the waiting time is not computed as either time on duty or time off duty.

Union Pacific's Operating Rules and Special Instructions for Grade Territory

Rule 1.17 of the Fourth Edition of the General Code of Operating Rules (GCOR), effective April 2, 2000, requires employees to remain on duty unless and until their train is properly protected (if it is located on main track) from other equipment and properly secured against unexpected movement. UP applies GCOR to its operations. In relevant part, GCOR Rule 1.17 provides as follows:

B. Exceeding the Law

Employees must not exceed the hours of service law without proper authority. However, they must not leave trains, engines, or cars on the main track without proper protection. Employees must secure trains properly and, if possible, before they exceed the hours of service. Except as provided by this paragraph, employees are then relieved of all duties.

GCOR Rule 1.17 apparently requires that before crewmembers awaiting the arrival of deadhead transportation are relieved of all responsibilities, they must perform two very specific duties. The train crew (or train dispatcher) must ensure the "proper protection" of the train by taking all necessary steps to prevent a following or opposing train, car, or locomotive from colliding with the standing train, and must "properly secure" the train by performing the necessary tie-up procedures.

(Continued on next page)

¹Appendix A to 49 C.F.R. Part 228 contains specific examples of activities that will return a crewmember to duty during the waiting period; these activities include protecting the train against vandalism, observing passing trains for any defects or unsafe conditions, flagging, shutting down locomotives, checking fluid levels, or communicating train consist information via radio.

In addition to GCOR Rule 1.17, certain UP special instructions applicable to areas where there are particularly steep grades require waiting crewmembers to “attend” the train unless and until they place their train on a track equipped with permanent derails or maintenance-of-way employees separate a rail on the descending direction in advance of the train to create a temporary derail. For example, in pertinent part, SI-14 Special Instructions for the Yuma Subdivision impose the following grade securement restrictions:

Do not tie up and leave a train unattended between Garnet and Loma Linda X-over unless:

1. The track the train is tied up on has derail protection; or
2. One of the rails on the descending direction in advance of the trains is separated by M of W which will create a temporary derail.

Union Pacific Railroad Los Angeles Area Timetable #1 at page 6. The SI-14 Special Instructions for the Mojave Subdivision contain identical grade securement restrictions for trains operating between Slover and Hiland and between Tehachapi and Ilmon. Timetable #1 at page 15.

Discussion and Analysis

As set forth in my previous correspondence, FRA’s initial conclusion was that, read together, GCOR Rule 1.17 and the UP timetable instructions applicable to grade territory required employees to remain on duty to protect the train against unanticipated movement until a relief crew arrives, unless derail protection has been provided. We based that understanding on the assumption that, by requiring the crew to “attend” the train in the absence of derail securement, the special instructions required employees to continuously perform specific duties, such as observing for warning signs of movement, to protect their train against unanticipated movement. Since GCOR Rule 1.17 says employees are relieved of all responsibilities only when their train is secured, and since the special instructions seemed to require continuous activity in the form of attending the train in order to provide securement in the absence of derails, we preliminarily concluded that employees attending a train in grade territory were on duty.

In your letter of December 12, 2000, you argued that train employees who “attend” a train are not performing service, but merely remain ready to do so should the need arise. You stressed that “attending a train” merely involves a requirement to “stay with” the train and a contingent responsibility to perform service if required. In your words, “[t]he crew does not have to search, inspect or actively observe anything.” You concluded that crewmembers return to duty only if they perform a contingent service (e.g., stopping a train that begins to roll away while stopped on a steep grade).

In your letter of March 30, 2001, you asserted that when crewmembers are attending a standing train at a heavy grade location they are not required to inspect the train or “actively do anything unless the train begins to move.” In response to my question, you specifically stated that the crew is not required to check for warning signs that a train is about to move unexpectedly. You also indicated that the crew must act in the event of unexpected movement in order to stop the train from rolling away. Moreover, you indicated that a crew would face railroad discipline if a runaway train resulted from the crew ignoring unexpected movement of the train or failing to respond appropriately.

Based on your representations, as we understand the railroad’s application of GCOR Rule 1.17 and its special instructions, UP train crewmembers awaiting deadhead transportation, even in grade territory, are required to stay with their trains but are relieved of all responsibilities unless and until they return to duty by taking action to stop a train that has started to move or perform another contingent task. The United Transportation Union, although offered the opportunity, has not offered any reason to believe that employees have specific duties to perform as a part of attending a train while awaiting deadhead transportation.

Even in the absence of specific duties to perform, the mere act of waiting to perform a contingent duty is generally time on duty under the HSL, since all time between reporting for duty and the final or interim release is ordinarily time on duty. For example, an employee who reports for duty at the assigned time but must wait while his or her locomotive is being prepared for service is on duty from the time of reporting until released. However, the statutory provision on time spent deadheading to the point of final release is an exception to the general rule of what constitutes time on duty, and the BLE v. ATSF case makes clear that time spent awaiting deadhead transportation to the point of final release is limbo time even though the duty to perform additional service may arise. Although contingent duties may arise during the deadhead transportation and waiting time, the employee is not merely waiting to perform a contingent duty during such times. While the need to actually perform contingent duties during the waiting period may be more likely in heavy grade territory, the absence of specific responsibilities during this period makes it impossible to distinguish a crew awaiting deadhead transportation in grade territory from a crew awaiting transportation in other territory. In either situation, a contingent duty may arise, causing the crew to perform specific services, but this possibility does not change the limbo time to time on duty.

FRA will apply the HSL in accordance with how UP is applying its rules and instructions. That is, as a general rule, assuming that the employees in fact perform no apparent service while awaiting deadhead transportation, FRA will treat the train crew’s waiting time, even where the crew is required to attend the train in grade territory, as limbo time. This conclusion is consistent with the Supreme Court’s holding in BLE v. ATSF. The fact that an employee is required to stay with the train while waiting does not in itself indicate the employee is providing service, assuming the employee is free to leave the train when transportation arrives.

On the other hand, FRA will consider crewmembers who perform an assigned task during the waiting period (e.g., monitoring gauges on a locomotive under the explicit instructions of the train dispatcher)—regardless of whether they have otherwise been relieved of responsibility for their train pursuant to the railroad’s own operating rules or special instructions—as on duty under the HSL until those duties have been completed. If the additional duty period results in the employee’s having exceeded his or her maximum on-duty period, FRA will consider taking enforcement action under the HSL.² Whenever FRA investigates an allegation that a crewmember performed duty during the waiting period, we will look beyond the boilerplate written instructions to train crews, and determine if the employee was required to do anything functionally other than remain available to return to duty. Should FRA find that an employee was in fact relieved of all responsibilities while attending the train, merely remained ready to act had the train unexpectedly moved, and was permitted to depart when deadhead transportation arrived, we will conclude that the employee was in limbo status.

Of course, the situation where a train crew is not free to leave its train when its deadhead transportation arrives is different from a situation in which the crew is free to depart even in the absence of a relief crew. Your March 30 letter offered no direct response to the request in my February 22 letter for an explanation as to “why, if the employees are truly relieved of all responsibilities while waiting for deadhead transportation, they are not free to leave the train unattended upon arrival of the deadhead vehicle.” Instead, you stated that since the deadhead transportation for an expired crew would normally be the same vehicle that arrived with the relief crew, this situation would not arise. However, we believe it is important for you to understand our position in case this should occur on UP.

The fact that the crew is not free to leave the train unattended even when transportation arrives is an indication that the employees must be doing more than merely sitting on the train awaiting transportation. The requirement to stay with the train becomes, at that point, a requirement to remain in the service of the railroad for the possibility of contingent duties, and that waiting time, unlike time merely spent awaiting deadhead transportation, is time on duty. While we are willing to accept UP’s position that merely attending a train while awaiting deadhead transportation entails no actual service, we cannot possibly consider time spent attending a train as part of deadhead transportation if the crew cannot begin deadheading when its transportation arrives.

² If the reason for the excess service involved a truly exceptional situation (i.e., a bona fide emergency), and the railroad proved to FRA that it employed due diligence to avoid or limit the excess service, the provisions of the HSL would not apply and FRA would not assess a civil penalty for a violation of the HSL. See 49 U.S.C. Sections 21102 and 21103; Appendix A to 49 C.F.R. Part 228. However, the railroad would still be required to report the excess service to FRA in accordance with 49 C.F.R. Part 228. See 49 C.F.R. 22819.

Moreover, there is no rationale for considering time as limbo time unless it is part of deadheading from the duty assignment. In BLE v. ATSF, the Court said the “issue is how to classify the time the outlawed crew spends *waiting for the deadhead transportation to arrive.*” 516 U.S. at 155 (emphasis added). The Court frequently repeats that it is looking only at “time spent waiting for deadhead transportation” (*id.* At 157, 159, 160) and ultimately states the issue as “how to treat the time spent waiting for deadhead transportation when no additional services are required” (*id.* At 161). Therefore, BLE v. ATSF finds waiting time to constitute limbo time under the HSL only if the crew is merely awaiting its transportation; implicit in the Court’s holding is that time spent waiting on a train for any other purpose is “additional service.” The Court’s insistence that the crew actually be waiting for deadhead transportation is based on the statutory nature of limbo time, which is confined to “time spent in deadhead transportation from a duty assignment to the place of final release.” 29 U.S.C. Section 21103(b)(4). The Court concluded that “time spent waiting for deadhead transportation is of the same character as the time spent in the deadhead transportation itself.” BLE v. ATSF at 157. However, there is no basis for considering time spent sitting on a train during which the crew is not simply awaiting deadhead transportation as a part of deadhead transportation, so it cannot be limbo time. Nor is there any basis to consider time spent by a crew on its train as time off duty, since it is not time that is available for rest at a point of final or interim release. Accordingly, time spent by a train crew on or with its train will be considered time on duty if that crew is not free to leave the train when transportation arrives.

Conclusion

FRA appreciates the input you have provided to us concerning proper application of the HSL in the context of your operating rules and timetable special instructions. Based upon our dialogue, FRA has concluded that if a railroad requires a train crew, even in grade territory, to attend its train by simply staying with it while awaiting deadhead transportation, if the railroad does not require or permit the crew to perform any service, and if the crew is free to leave the train as soon as its deadhead transportation arrives, the train crew’s waiting time counts as limbo time. However, should FRA receive credible evidence that crewmembers whose maximum duty hours had already expired under the HSL actually performed service for the railroad during the waiting period, we will likely take appropriate enforcement action. In addition, if FRA determines that waiting crewmembers were not free to leave a train when their deadhead vehicle arrived, we will conclude that they were apparently not “awaiting deadhead transportation,” and were instead on duty performing service for the railroad.

Although requiring employees to attend their trains while awaiting deadhead transportation in grade territory may not violate the HSL, employees on many railroads are still being required to spend inordinate amounts of time awaiting transportation after the expiration of their duty hours. We strongly urge UP to continue to work with its employees to find ways to minimize these waiting times and get crews to their final release points quickly. Please feel free to call me (202) 493-6030 if you would like to discuss this matter further.

Signed by Daniel C. Smith, Assistant Chief Counsel for Safety